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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1091

JERROLD K. COOK, *Petitioner,*

v.

REPUBLIC STEEL CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JERROLD K. COOK,
1510 Ruxton Road,
Baltimore, Md. 21204,
Petitioner.

The Daily Record Co., Baltimore, Md. 21203

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Jerrold K. Cook, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on January 12, 1965.

OPINIONS BELOW

There was no opinion rendered by the District Court. Charge of the Court to the Jury is found on page 1 of the appellant's record appendix which is filed with this petition as part of the certified record of transcript. The judgment and order of the District Court was not reported. It is printed in Appendix A hereto, infra, p. 1a. The opinion

of the Circuit Court of Appeals, printed in Appendix B hereto, infra, p. 2a, is reported in 340 F. 2d 1965, Mem. C.A. Md.

SUPREME COURT JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the questions are important.

2. Whether there has been previous authority for granting the writ.

3. Whether the Court of Appeals has failed to decide an important question of law in the labor field by not recognizing an actionable tort involving negligence and misrepresentation and agreeing that it exists.

4. Whether the Court of Appeals has failed to sustain a common law theory of negligence by not finding a legal duty and defining the standard of conduct required for the protection of others against unreasonable risks.

5. Whether the Court of Appeals, in affirming the judgment and order of the District Court, has indirectly rendered decisions in conflict with the decisions of other courts of appeals on the same matter.

6. Whether the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by sanctioning such a departure by the District Court that there is call for an exercise of the Supreme Court's power of supervision.

7. Whether the courts of law can or are willing to afford a remedy in such tort actions affecting the employment of private individuals.

DISTRICT COURT JURISDICTION

Your petitioner filed the original complaint in the United States District Court for the District of Maryland in 1957. Jurisdiction of that Court was invoked under 28 U.S.C. 1332 because of diversity of citizenship and the amount in controversy. The plaintiff was a citizen of the State of Maryland and the defendant was incorporated in the State of New Jersey and its principle place of business was in Ohio. The complaint alleged that the defendant committed a wrongful act and injured the plaintiff by interfering with his legal right to seek and secure employment; that this interference consisted of giving false, inconsistent and damaging references to prospective employers, thereby abusing all normal privilege; that these references contributed to the prevention of the plaintiff from securing employment and some were the result of malice and intent and others resulted from negligence in job evaluation and classification, termination procedure and in the giving of references. The period of unemployment contributed to damages consisting of loss of income, employment-seeking costs, loss of reputation, mental anguish and punitive damages. The plaintiff demanded relief amounting to $379,000 and a trial by jury.

STATEMENT

1. *Employment Period*

a. The plaintiff, Jerrold K. Cook, was hired by Republic Steel, the defendant, in 1952 to do the work of a *Foreign Marketing Research Analyst*, in the New York Export Department. His prior background consisted of a degree in Economics at Harvard, graduate study in business, four years in the Navy during World War II as an officer, and employment with a Boston trust company, Bethlehem Steel Com-

pany, United States Steel Corporation and the Container Corporation of America (Aplee. 21, 22, 52, 54, 55, 56).*

b. Cook conducted foreign marketing surveys for Republic. One was a comprehensive report on Spain for the president of the corporation. Another was a research study on the importance of Latin America as a market for steel mill products. Still another was a report on tariffs levied by the U.S. on steel mill products and on the raw materials consumed by the steel industry. This study was for the American Iron and Steel Institute and segments were to be incorporated into a statement before the Executive Commission on Foreign Economic Policy (Aplnt. 12a, 13a, 19a [Plaintiff's Exhiibt No. 4] and Aplee. 24, 31).

2. *Resignation*

a. The plaintiff resigned from Republic in December of 1953 after signing an affidavit for the Anti-Trust Division of the Justice Department to the effect that certain leading steel producers were fixing steel export prices and that the American Iron and Steel Institute had sent an erroneous statement to a Presidential Commission (Aplee. 37, 38).

b. At the time of resignation, Cook was given a Record of Employment Slip for the use of the Division of Placement and Unemployment Insurance of the New York State Department of Labor. His occupation was listed as a *Commercial Research Analyst* (See Aplnt. 20a for a copy of the slip which was Plaintiff's Exhibit No. 5). At this time, D. P. Kipp, Office Manager, told Cook for the first time

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* "Aplee." denotes Republic's record appendix filed with this petition. "Aplnt." denotes Cook's record appendix. "R. Aplnt." denotes Cook's record appendix to his reply brief filed with this petition as part of the certified record of transcript. (Cook was the plaintiff, appellant and petitioner while Republic was the defendant, appellee and respondent, respectively.)

that this was his official title (Aplee. 38). (Also see Aplnt. 13a.)

3. *Seeking Employment*

a. After dissolving a steel exporting business, the plaintiff sought employment by writing hundreds of letters for interviews, registering at employment agencies, answering help-wanted advertisements, making personal calls on companies and paying consulting fees. On resumes and application blanks he listed Republic as a previous employer. Even though initial interest was aroused, no offers for employment were extended (Aplee. 38, 39, 40).

4. *Investigation Concerning References*

a. The plaintiff checked references. In March of 1955 he retained the Diggins Detective Agency. A reference questionnaire was returned by Republic. It stated that (1) Cook had resigned; (2) had held the position of Market Research Analyst; (3) had desired to build up too large a department than justified; and (4) that Republic would not rehire (Aplee. 44, 45). For copies of letter and completed questionnaire see Aplnt. 31a and 32a (Plaintiff's Exhibit No. 13).

b. An investigative company, called the General Machinery Corporation, mailed letters and reference questionnaires to previous employers in 1956 (Aplee. 44, 45). For a copy of the letter mailed to Republic see Aplnt. 30a (Plaintiff's Exhibit No. 8a). All employers replied in writing except Republic (Aplee. 45, 46). Bethlehem Steel stated that they had no records on Cook. For a copy of the letter returned by Bethlehem see Aplnt. 33a. Republic denied having received the letter from the General Machinery Corporation (Aplee. 46). Yet, Thomas L. Smith, speaking

for the General Machinery Corporation, stated under oath that someone from Republic had telephoned in answer to the letter and stated that Republic had discharged Cook because he had had ideas of grandeur and had tried to establish a large department (Aplee. 136-145). Ivan Underwood, Assistant Export Manager, stated at a deposition that he knew about the letter but that he didn't see it when it came in (Aplnt. 12a).

c. In 1957 the plaintiff applied for a position with the U. S. Government as an *Economist* in the field of International Trade and Development (Aplee. 49-51). For copies of the *Application for Federal Government* see Aplnt. 21a and 22a (Plaintiff's Exhibit 10A). Cook stated on this form that the title of his position with Republic was *Foreign Marketing Analyst*. The U. S. Civil Service Commission mailed qualification inquiries to six members of Republic's Export Department (Aplee. 51). For copies of the letter and inquiry form see Aplnt. 23a and 24a (Plaintiff's Exhibit 10C). Republic stated on the form that the official job title of Cook was that of *Clerk, Sales Promotion and Research*. This was contrary to what Republic told Cook his classification was. And, upon a motion to produce, Republic came forth with a Salary Pay Roll Memorandum indicating that the official title of Cook was *Clerk, Sales Promotion*. For a copy of the Pay Roll Memorandum see Aplnt. 27a (Part of Plaintiff's Exhibit No. 14).

d. D. P. Kipp of Republic stated that he gave a reference on Cook to Butler Manufacturing Company but did not state what he said (Aplee. 76). Republic told the Charles P. Raymond Service that Cook had been engaged in research (Aplee. 149); the William V. Rausher Associates that he had been a statistician (Aplee. 151); Argus Cameras, sales research (Aplee. 153).

5. *Negligent Handling of Personnel by Republic*

a. During depositions and at the trial, a number of Republic's employees testified in relation to personnel handling of the Corporation. James Conrad, Assistant Export Manager, stated that he did not see any difference between a *Clerk* and a *Commercial Research Analyst*. He went on to state that the job classification on Cook given to the Civil Service Commission may have been pulled out of somebody's head or taken from some card (Aplnt. 11a).

b. Elton Hoehn, of the Sales Department, stated that Republic had no one in charge of personnel (Aplnt. 15a). Hoehn stated that (1) he knew nothing about a termination form used in business (2) Republic did not have a job description and set title for each employee and that an employee was never told what his job title was (3) that everyone in the Export Department, other than the Export Manager or Assistant Export Manager, were classified as clerks or equivalent (Aplnt. 15a, 16a). To attempt to prove the latter point, Hoehn produced a list stating that it contained all the names of export personnel and that the predominant title was that of clerk (Aplnt. 28a and 29a — Defendant's Exhibit 1A). Arguing his motion for a new trial, Cook produced two exhibits not available at the trial to prove that this testimony was false. One was a list of the leading personnel of the Export Department (Aplnt. 34a). Not one name was on the list produced by Hoehn. Not one person was classified as a clerk. The second was a page from the annual report of Republic for the year 1962. It showed that Republic did have someone in charge of personnel, E. J. Magee (Aplnt. 35a).

6. *Testimony of Expert Witnesses Excluded*

a. The plaintiff called a marketing expert as a witness, Philip Dolan. He testified that Cook's reports were the

work of a *market analyst* and dealt with *foreign economic research*. The witness stated under questioning that there was a difference between *market research* and *sales promotion*, that the term *commercial research analyst* was synonymous with *market research analyst;* and that a *statistician* was something different than a *market analyst* (Aplnt. 14a). The expert witness was not permitted by the Court to explain the difference between a *clerk* and a *commercial research analyst*. This was over the exceptions taken by the plaintiff's counsel at the bench (Aplnt. 14a).

b. Because of the exclusion of this relevant and pertinent evidence by the Court, Cook introduced exhibits in his reply brief to show the difference between the titles (R. Aplnt. 2r and 3r). A job specification sheet for a clerk was also included as an exhibit (R. Aplnt. 6r). Cook also included an exhibit which described the nature of Cook's work by an expert who was not available at the trial (R. Aplnt. 4r).

c. George M. C. Nelson, a personnel expert, was not allowed to explain to the jury standard practices of termination procedure and the giving of references employed by industry (Aplnt. 14a). The plaintiff was pleading negligence in addition to malice and intent in the giving of references. To show the appellate court just what kind of evidence was excluded, the plaintiff included in his reply brief a copy of a termination slip used by Remington Rand (R. Aplnt. 5r). A description of the use of this slip was included on R. Aplnt. 7r. The use of such a termination slip insured accurate job titles in giving references and speeded up the process of giving consistent references always from the same source.

d. The personnel expert was not permitted to testify in relation to job evaluation and classification as employed

in industry (Aplnt. 14a). It is an important part of industrial relations. Republic was deficient in this field. The nature of the evidence excluded is explained (R. Aplnt. 1r, 6r and 7r). By providing information about duties, grouping and indentifying positions, and establishing logical pay relationships, job evaluation aids in selection, placement, training, promotion, function, authority, responsibility and separation, including the giving of references.

7. *Exclusion of Other Evidence by Court*

a. The Court excluded other relevant and pertinent evidence. It would not permit the plaintiff to tell the jury just how he had been damaged; how it felt to have nothing to do each day except seek employment; how much income had been lost; how his reputation had been hurt by a long period of unemployment (Aplnt. 13a).

8. *False and Misleading Statements of Defendant*

a. In the summation to the jury, the defendant made false and misleading statements. He stated that the plaintiff did not try to get a Civil Service position; that unless you were an export manager or assistant export manager in the export area of Republic, you were a clerk in sales promotion. He then tried to mislead the jury by comparing the title of *Clerk* in the judiciary with the job title of *clerk* in the business world (Aplnt. 18a).

9. *Motions for a Directed Verdict*

a. At the conclusion of the arguments of both sides, motions for a directed verdict were denied.

10. *Colloquy on Instructions*

a. In the colloquy on instructions the Court ruled out negligence as a factor to be considered in defamation over

and above the objections of the plaintiff's counsel (Aplnt. 17a).

b. The Court also ruled out mental anguish as a legitimate component of the damages which the jury should have been entitled to consider. This, too, was excepted to by plaintiff's counsel (Aplnt. 17a).

c. The Court ruled that there had to be malice to upset privilege. This was objected to by counsel (Aplnt. 17a).

d. During the colloquy on instructions, Mr. Hoppen. counsel for the plaintiff, stated: "I will state for the record at the direct request of my client that he feels that one of the important facts in this case was that the failure of Republic to properly advise him of his true classification, was, in itself, a deprivation and constitutes an actionable right in that they classified him as a *clerk* to his back and a *research analyst* to his face. So my client feels this is an essential part of the case and should be reflected in any charges which are given to the jury" (Aplnt. 17a and 18a). The Court ignored this request.

11. *Charge of Court to Jury*

a. Excerpts from the *Instructions to the Jury* are as follows (Aplnt. 1a-9a):

> 1. "It is the responsibility of the jury to accept the law as it is outlined to you by the Court. You will reach your judgment based solely upon evidence which you heard from the witness stand, upon the exhibits which were received in evidence, and the inferences which are reasonably deducible from the evidence and the exhibits. I have not expressed what facts are, or are not, established, or what inferences should be drawn from the evidence adduced."
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> * * * * * *
>
> 2. "Mr. Cook says that each time a prospective employer contacted Republic Steel to investigate his back-

ground and work record, Republic through its agents made statements to the prospective employers which were false and which were maliciously made. Mr. Cook contends that these alleged poor recommendations and alleged misstatements were the direct cause of his not being able to find the type of employment he sought."

* * * * * *

3. "The defendant says that Mr. Cook worked as a clerk in the sales promotion section of Republic's Export Division in New York. Republic claims that since 1953 it has had five or six inquiries about Mr. Cook and it says that on each occasion it gave fair and proper recommendation to the inquirer."

* * * * * *

4. "Now, I instruct you that the New York law, which is the applicable substantive law in this case, provides that one who gives false and malicious statements done with the deliberate purpose of causing injury to another is liable for the harm caused by those statements."

* * * * * *

5. "To find Republic Steel liable to Mr. Cook for any damages which Mr. Cook is claiming against Republic, you must be convinced of two things: One, you must be convinced that false and malicious statements were made by Republic pertaining to Mr. Cook and his qualifications for employment, and assuming you find this you must also find: Two, that these false and malicious statements were the proximate cause of Mr. Cook's damages."

* * * * * *

6. "It is not enough that the statements were merely made negligently or even made with wanton disregard for Mr. Cook's rights."

* * * * * *

7. "Communication between a former employer and a prospective employer regarding an applicant for a position are what we call privileged. But an employer

cannot with malice or bad faith reply to reference requests with the bad purpose of depriving the former employee of an opportunity for employment."

* * * * * *

8. "Now in this case, I am going to comment on some of the evidence."

* * * * * *

9. "The only thing that apparently was not true (in the telephone call of Republic to the General Machinery Corporation) was that he was released or discharged. When Mr. Smith was questioned closely about that, he said the person who spoke for Republic Steel said definitely that he didn't say anything about being fired."

* * * * * *

10. "One reply was, again, to Rauscher, and that was in 1958, even after the suit had been filed, and Rauscher, as you recall, was also a fictitious person that did not intend to employ Mr. Cook. But in any event that was an excellent recommendation in which they said the highest — made the highest recommendations."

* * * * * *

11. "Back in 1957 an outfit in Boston known as Raymond Services, or something like that, made an inquiry of Republic Steel, and they were people who placed people in jobs, and that sort of thing, and there again, there was an excellent reference made by Republic."

* * * * * *

12. "In 1955 you had also a letter from Republic Steel to the Diggins Detective Agency, and that matter they set forth in that letter, and they consider that Republic Steel stated that only the highest, they did say they would not rehire him, but there is nothing wrong with that."

* * * * * *

13. "Who could wish for a better recommendation than that recommendation? (Argus Camera) And the same thing is true of the Civil Service application and

the reply that Republic made to the Civil Service people on April 9, 1957. The only thing that they did say, they classified Mr. Cook as a clerk in the promotion of the sales department."

* * * * * *

14. "Now all of these references must be taken as a whole, and in there they outline his work as very good. And it has been testified on the stand and not denied that the classification of all the people in the Export Department with the exception of the manager or assistant manager, were known as clerks."

* * * * * *

15. "If you find in evaluating the recommendations that the classification of clerk as a description of plaintiff's work was done in accordance with defendant's established procedure in job titling and without malice toward the plaintiff, then you cannot find that the defendant would be liable for making such classification of the plaintiff's job. This is so even though the classification is not that under which the plaintiff assumed he was working or may not be the same classification given to one performing similar work for another employer."

* * * * * *

16. "Before you can consider the substance of the telephone conversation (Republic with the General Machinery Corporation) you must be convinced that a letter was properly addressed, stamped and mailed to Republic Steel. If you believe that these events occurred, then a presumption arises which you must follow that the letter was duly delivered to the addressee, Republic Steel."

* * * * * *

17. "The plaintiff has the burden of proving, again by a fair preponderance of the affirmative evidence satisfactory to you, each and every element of injury or damage which he alleges was a natural, direct and proximate consequence of the occurrence."

* * * * * *

18. "Your verdict will be for the plaintiff or for the defendant, and if for the plaintiff, as I have said, in the amount that you award."

12. *Motion for a New Trial Denied*

a. The jury decided for the defendant and the plaintiff filed a timely motion for a new trial based on the following grounds: (1) that the verdict was contrary to the law and the evidence (2) that the Court excluded relevant and competent evidence (3) that the defendant offered irrelevant, incompetent, misleading and false testimony (4) that the defendant was in contempt of court by ignoring two subpoenas (5) that exhibits admitted in evidence were not shown to the jury and (6) that the jury was unable to comprehend all the facts of law and evidence. After a hearing on the motion, it was denied by the District Court. (See official records filed in the Court.)

13. *Judgment of District Court Affirmed by Court of Appeals.*

a. The plaintiff appealed to the Circuit Court of Appeals for the Fourth Circuit where the judgment of the District Court was affirmed.

REASONS FOR GRANTING THE WRIT

1. The Questions Involved are Important

a. The first and all-important question is whether the courts of law have afforded a remedy in the form of an action for damages for the torts committed by the defendant. The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable. In other words, has the plaintiff been duly compensated for the losses suffered,

if, indeed, it is at all possible to do so merely by pecuniary award?

b. Secondly, there is the question of protecting the rights of employees in general. Applicable torts should be recognized by the courts. If protection is not afforded by statutory legislation, then the common law should do so. For instance, has an employer the right to tell an employee upon termination that he has one job title and then tell prospective employers that the employee had a much lower classification? Then again is it right to assign a job title to an employee when that title underclassifies the work actually performed by the employee, regardless of whether or not the employee was informed about the title? The courts have failed to answer these important questions of law in this case; questions which affect millions of employees. This case involves the field of personnel management, particularly in the field of job evaluation and wage classification. The proper assignment of job classifications and titles is important not only in the determination of salaries but also in separations where it is necessary to give accurate titles in references. A misclassification may undermine the value of years of education, training and experience. Even job classifications in accordance with established procedure are no excuse. Some customs are the result of careful thought while others are the result of inadvertence that is associated with negligence. Even an entire industry, by adopting careless methods, cannot be permitted to set its own uncontrolled standard.

c. Third, there is the important question involving defamation in the giving of references and blacklisting in general. What label or theory of law should be attached to each actionable wrong: slander, libel, negligent statement, prima facie tort? What sort of defamation is actionable per se and what sort requires proof of special damages?

Once special damages are proved, what general damages are then allowed? And what about the conflict of laws? Where does publication take place and the law of what State governs? Do some States attach a label of prima facie tort to a libel action affecting trade, business or employment in order to escape the shorter statute of limitations for ordinary libel? Can you have defamation without malice or intent? Can you upset privilege by negligence instead of malice? Can lack of belief in the truth of a statement destroy privilege? It is felt that these questions have not been properly answered.

d. Next, there is the important question of discovering whether the U. S Circuit Court of Appeals decided differently than some other Courts of Appeals. What does the per curiam decision mean when it states: "We find no error affecting any substantial right of the plaintiff-appellant"? Does this mean that the Appellate Court agreed with the ruling on the law by the District Court? If it does, it means that the U. S. District Court of Appeals did not agree with the Court of Appeals for the Second Circuit when the latter ruled that negligence and wanton disregard of another's rights will upset qualified privilege. The District Court stated that only malice will destroy privilege. Does the memorandum decision of the Court of Appeals mean that the District Court did not commit such errors as exclusion of relevant evidence, prejudicial comment and misstatement of the facts, denial of a new trial after it was proved without a trace of doubt that the defendant offered deliberate and false testimony? In his motion for a new trial the petitioner cited nineteen authorities substantiating his motion. The District Court summarily denied the motion with no opinion offered. Many of the decisions cited were handed down by Courts of Appeal. Does this mean that the Circuit Court of Appeals

for the Fourth Circuit was not in agreement with these other Courts of Appeal?

e. Then we have the question, which is important, whether the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by sanctioning such a departure by the District Court that there is call for an exercise of the Supreme Court's power of supervision as mentioned in Rule No. 19.

2. There is Previous Authority for Granting the Writ

a. "The whole case being before the Supreme Court on writ of certiorari to the Circuit Court of Appeals, the contention of errors in instructions must be examined." *Camp v. Gress*, 39 S. Ct. 478, 250 U.S. 308, 63 L. Ed. 997.

b. "The writ is appropriately issued, however, when there is usurpation of judicial power or a clear abuse of discretion." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379.

c. "One of the circumstances in which a review on writ of certiorari could be considered is where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Rule 19, U.S. Supreme Court.

d. "Another such circumstance is where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter." Rule 19, supra.

3. The Court of Appeals has Failed to Decide an Important Question of Law in the Labor Field by not Recognizing an Actionable Tort Involving Negligence (Misrepresentation) and Agreeing that it Exists.

a. The question is: "Is it right for an employer to tell an employee upon termination that his official job title is

that of a *Commercial Research Analyst* and then state to prospective employers, without the knowledge of the employee, that his official title was *Clerk, Sales Promotion and Research?"*

b. In the *Statement* it was noticed that the Court refused to rule on the law in relation to these facts in the charge to the jury. The Court also ruled out negligence saying the statement had to be false and malicious to be actionable. The Court also ruled that special damages had to be proved. And it stated that there had to be malice to upset privilege, according to the law of New York which governed. Moreover, the Court ruled out mental anguish as a component of damages over the exceptions of counsel.

c. In his appeal brief the petitioner outlined his interpretations of the New York law. It is argued here that the District Court did not rule on this law properly, and that the Court of Appeals should not affirm the judgment of the District Court. Below is outlined some pertinent law on the entire matter:

Negligent Statements

(1) New York State recognizes a common law cause of action for negligent use of language. In *Gediman v. Anheuser Busch, Inc.*, 299 F. 2d 537 (C.A. 2), the employer was held liable for negligently, although in good faith misinforming an employee as to the consequences of the election he had made upon retirement in the employer's pension plan.

(2) In *International Products Company v. Erie R. Co.*, 155 N.E. 662, 244 N.Y. 331, it was ruled:

> "A false statement negligently made may be the basis of a recovery of damages for injury or loss sustained in consequence of reliance thereon, but it is not every casual response or every idle statement, no matter

how damaging the result, which will give rise to a cause of action. In order that such liability may exist it is necessary that:

a. The relationship of the parties be such that one has the right to rely on the other for information.

b. The one giving the information should owe to the other a duty to give it with care.

c. The person giving the information should have knowledge that the information is desired for a serious purpose.

d. The person to whom such information is given intends to rely and act on it.

e. If the information given is erroneous, it will result in injury."

Defamation Resulting from Negligence

(1) In *Weidman v. Ketcham*, 278 N.Y. 129, 15 N.E. 2d 426, it was ruled that "publication must be intended, or the result of gross negligence."

(2) This is substantiated in Restatement, *Torts*, 579, 580: "Intention or negligence ordinarily must exist in order for a statement to be actionable as defamation."

Negligence Necessary to Destroy or Upset Qualified Privilege.

(1) In *De Ronde v. Gaytime Shops*, 2 Cir., 239 F. 2d 735, it was ruled: "Under New York law the malice necessary to destroy qualified privilege does not mean alone personal ill will but may also mean such wanton reckless disregard of rights of another as is ill will's equivalent."

(2) Again, in *Stephens v. Columbia Pictures Corp.*, 2 Cir., 240 F. 2d 764 (1957) cert. den. 353 U.S. 949 (1957), it was decided: "Under New York law, malice which will destroy qualified privilege is not limited to personal ill will but may also consist of wanton and reckless disregard of another's rights."

Lack of Belief in Truth to Upset Qualified Privilege

(1) In *Teichner v. Bellan*, 181 N.Y.S. 2d 842, 845 (1959), the Court stated: "The protection of a qualified privilege is lost if it appears that the defendant acted without a bona fide belief in the truthfulness of the defamatory matter."

(2) This is substantiated in Restatement, *Torts*, pars. 600, 601.

Defamation Affecting Trade, Business, Profession and Employment is Actionable Without Proof of Damage.

(1) "Words need not hold one up to hatred, ridicule, or contempt (*Rodger v. American Kennel Club*, 266 N.Y.S. 451, 131 Misc. 312) or accuse him of fraud or dishonesty (*Herando Plantation Co. v. Slovak Press*, 228 N.Y.S. 194, 223 App. Div. 286) in order to libel him in his business or calling. The ground of action in such cases is that the party is injured in his profession or trade or exposed to the hazard of losing his business or employment in consequence of the defamatory words, and not that his general reputation in the community is affected by them."

(2) "Any language imputing *want of integrity*, whether it is spoken or written, a *lack of due qualification*, or a dereliction of duty is actionable per se." *Phelan v. Rheinstein*, 233 N.Y.S. 297, 133 Misc. 853.

(3) "Under New York law, rules in libel are different when statements imputing want of competency or fitness in the conduct of a business, profession, trade or employment are ordinarily actionable per se." *Mueller v. Rayon Consultants, Inc.*, 170 F. Supp. 555, appeal denied 271 F. 2d 591.

In *Gersh v. Kaspar & Esh, Inc.*, 206 N.Y.S. 2d 510, it was held where a statement that former employee was a mere clerk rather than the kind of supervisor he claimed

to have been was not, without more, slanderous per se, and it was necessary for former employee to allege special damages. Judge J. Rabin, dissenting, stated that where words are defamatory they are actionable per se if they are spoken of one in connection with his business or calling. Judge Rabin stated that the word "mere" was what made the statement actionable per se, which may signify either that the words are defamatory on their face or that they are actionable without proof of damage because of recognition that by their nature there was pecuniary or "temporal" loss rather than spiritual loss. (It is noted in this case there was no misrepresentation involved because the employer did not previously tell the employee that his title was that of "supervisor.")

Proof of Special and General Damages

(1) Even in cases such as *Gersh v. Kaspar*, supra, where the majority opinion ruled out defamation per se, it is possible to replead special damages caused by the statements of the defendant. It is also possible to plead special damages *in addition* to damages which are naturally assumed when there is defamation affecting business or employment. This is substantiated in Restatement of *Torts*, par. 622: "One who is liable either for a libel or for a slander actionable per se is also liable for any special harm of which the defamatory publication is the legal cause." It is "special" in the sense that it must be supported by *specific* proof, as distinct from the damage which is *assumed* to follow in the case of defamation per se. To prove such special damage as loss of income from employment, caused by the defendant stating that the plaintiff was a "clerk" and in so doing making him falsify his application blank in the minds of the reader, the plaintiff is not required to establish the fact of causation with absolute certainty. It is sufficient that he introduces evidence from which reason-

able men may conclude that it is more probable that the event was caused by the defendant than that it was not. This was substantiated in *Pumphrey v. Manor Real Estate and Trust Co.*, 4 Cir., 1949, 176 F. 2d 414.

(2) Once the cause of action is established, either by defamation per se or the proof of pecuniary loss (special damage), the bars are lowered and general damages may be recovered for injury to the plaintiff's reputation, his wounded feelings and humiliation, resulting physical illness, as well as estimated future damages of the same kind. This was substantiated in *Hogan v. New York Times Co.*, 211 F. Supp. 99, affirmed 313 F. 2d 354 where it was ruled that:

> "Plaintiff in libel action, when entitled to general damages, may recover not only for such damages as they have suffered up to trial but also any damages reasonably certain to be sustained in the future. General damages may embrace any losses enhanced by bringing of action and by trial with consequent publicity. Jury was to consider extent to which plaintiff's reputation had been affected for worse, and, as incidental to that, any injured feelings, any ridicule or shame which had come to him, and any insult, humiliation or disgrace he had been caused."

Conflict of Laws

(1) It was ruled by the District Court that New York law governed in this case. There is a very fine line of distinction. In *Stephens v. Columbia Pictures Corp.*, 2 Cir., 240 F. 2d 764 (1957), cert. den. 353 U.S. 949 (1957), it was ruled that the New York law of libel governed because New York was where the publication took place.

(2) The same opinion was rendered in *De Ronde v. Gaytime Shops*, 2 Cir., 239 F. 2d 735.

(3) And in Restatement, *Conflict of Laws*, Sec. 377, par. 5 it says that "libel and slander take place where the

defamatory statement is communicated and not in the place from which the offending material originates or is sent."

(4) In this case the offending material was sent from New York to Washington, D.C. and Baltimore, Md. in relation to the phone call to the General Machinery Corporation, the questionnaire mailed to the U.S. Civil Service Commission and the report to the Diggins Detective Agency. The governing case for the latter two communications was decided in *Mueller v. Rayon Consultants, Inc.*, 170 F. Supp. 555, appeal denied 271 F. 2d 591: "Under New York law, dictation in New York to a stenographer for purpose of typing a letter to be mailed outside the State is sufficient publication in New York to constitute a libel."

Label to be Attached to the Torts

(1) There conceivably could be different theories of law attached to each interference of the defendant with the plaintiff's right to seek employment as outlined in the *Statement.* The telephone call could be *slander;* the report to Diggins Detective Agency, *libel;* the report to the Civil Service Commission, a *negligent statement involving misrepresentation.*

(2) Or all the actions of Republic may have been labeled *prima facie torts* under the law of New York. In *Sheppard v. Coppers, Inc.*, 13 Misc. 2d 862, 156 N.Y.S. 2d 391, affd. 3 A.D. 2d 909, 163 N.Y.S. 2d 947 the plaintiff alleged that he had been employed by the defendant, and that the defendant had conspired to damage plaintiff's reputation in his trade and occupation by making, publishing and declaring false and malicious statements, reports and rumors to prospective employers of plaintiff. This resulted in his inability to obtain employment and damaged his reputation, and plaintiff further alleged that these acts and rep-

resentations were made with the intent to injure plaintiff in his efforts to obtain employment. In holding that the complaint stated a cause of action in prima facie tort, the Supreme Court held that the longer statute of limitations was applicable. (In this case of *Cook v. Republic*, the District Court ruled at a hearing on February 19, 1960 that a three-year statute of limitations in Maryland governed the action.) (Aplnt. 10a).

(3) Thus it is clear that there is the necessity for the Courts to clearly define the law in the above matters.

d. Now what was the purpose of the above summary of the law as the petitioner sees it? Its purpose was to show that the District Court should have ruled on the law differently. And the only place where the ruling on the law counted was in the instructions to the jury. District and Appellate Courts do not like to grant new trials which were before a jury. But has not the appellant or petitioner the right to challenge the decision of a jury when he is convinced that the instructions were in error, particularly after timely objections were made? And is there not a chance for redress when the Court deliberately cuts off the testimony of expert witnesses during the trial; or denies a motion for a new trial when errors, including later-discovered false testimony, are pointed out to the Court?

e. How would the jury have decided if (1) the marketing expert had been allowed to state the difference between a *clerk in sales promotion* and a *research analyst* (2) the personnel expert had been permitted to show how Republic's personnel policies were deficient in relation to job evaluation and termination, including the giving of references (3) the plaintiff had been allowed to tell the Court what his damages were in relation to loss of income and mental anguish (4) the jury had known about Republic's

testimony that everyone, except the top two in the department, was classified as clerks, was false (5) the Court had ruled properly on the law and (6) if the Court had not misstated the facts in its charge to the jury?

f. Taking the relevant law and facts into consideration the *Charge of the Court to the Jury* may have appeared something like the following with regard to the Civil Service reference in particular (and assuming evidence was not excluded by the Court):

(1) "Mr. Cook says that in almost every instance he was able to investigate Republic's references on him, he found that Republic was giving false, inconsistent and damaging references, which interfered with his right to seek employment. Mr. Cook contends that in some instances these references were the result of malice and intent and others may have been the result of negligence. The interference contributed to his not finding employment which resulted in damages. Mr. Cook also claims through inferences reasonably deducible from the facts that Republic made damaging statements to other prospective employers."

(2) "In one instance, Mr. Cook alleges that upon termination Republic classified him as a *Commercial Research Analyst* on a slip for the New York State Department of Labor. He also claims that this was the only time that Republic told him what his official job title was. Then Mr. Cook alleges that Republic told the U.S. Civil Service Commission in a qualification reference questionnaire that Cook's official job title was *Clerk in Sales Promotion and Research*. Mr. Cook claims that this was a form of misrepresentation and was damaging on two counts: (1) the action made it appear that Cook falsified his application blank, making him subject to fine and imprisonment (2) the classification destroyed his chance of obtaining a position with the government as an Economist because a government personnel manager would not dare hire a 'clerk' for an economist's position."

(3) "Mr. Cook alleges that this action of Republic, if not caused by malice, must have been caused by negligence. The act was a reflection on his integrity and on his skill and contributed to his not being hired by the Federal Government, in that it reduced his rating as a GS-9 Economist and discouraged hiring by any government personnel officer."

(4) "Now, I instruct you that the New York law, which is the applicable substantive law in this case, provides that:

a. "There is a common law cause of action for negligent use of language, particularly when the relationship of the parties is such that one has the right to rely on the other for the information; that one giving the information owes to the other a duty to give it with care; that the person giving the information has knowledge that the information is desired for a serious purpose; that the person receiving the information intends to rely on it; and that if the information given is erroneous, it will result in injury.

b. "That damaging statements come under the law of defamation consisting of libel and slander, and that defamation may be caused by malice or intent or negligence or wanton disregard of the rights of another.

c. "The communication between a former employer and a prospective employer regarding an applicant for a position is what is called qualifiedly privileged. But an employer cannot with malice or negligence reply to reference requests with the result of contributing to that employee not being hired. If there is malice or negligence the privilege is upset or destroyed. The same holds true if the employer has lack of reasonable grounds to believe in the truth of the matter.

d. "That defamation or any language imputing want of integrity and a lack of qualification which affects a person in his business or in his employment is what is called actionable per se. This means that the words are defamatory on their face or are actionable without proof of special damages or pecuniary losses. In cases

of defamation per se, it is assumed that the statements affecting employment resulted in pecuniary losses.

e. "Yet, this does not mean that a person cannot plead special damages as well. These damages may consist of actual loss of income which reasonable men would conclude that it is more probable that it was caused by the defendant than that it was not.

f. "If you conclude that there was defamation per se or that there was proof of special damages consisting of loss of income, then you may award such general damages consisting of mental anguish, loss or reputation, wounded feelings and humiliation, including damages which are reasonably certain to be sustained in the future. You may also consider any damages which embrace losses enhanced by bringing of action and by the trial.

g. "You may also award what is called exemplary or punitive damages. These damages act not by way of compensation, but by way of punishment of a wrongdoer as an example to others, if you believe there was malice involved.

h. "You may base your findings solely upon the evidence that has been produced before you and upon any inferences reasonably deducible therefrom."

(5) "Now, in this case, I am now going to comment on some of the evidence. Mr. Cook was hired as a marketing research analyst. Mr. Dolan, the marketing witness, testified that he performed the work of a marketing analyst. Upon Mr. Cook's resignation he was given a slip to claim unemployment benefits from the New York State Department of Labor. His official title on the slip was that of *Commercial Research Analyst*. This was the first time that Mr. Cook was notified as to his official title. After leaving the company Mr. Cook told prospective employers that his position was that of a market analyst which is synonymous with commercial research analyst. Yet, it was discovered that Republic told the U.S. Civil Service Commission that Mr. Cook's official title was that of a *Clerk in Sales Promotion*. Republic produced a pay roll

memorandum with Mr. Cook's title listed in the same way — *Clerk, Sales Promotion.* No one knows how many other prospective employers were told that Mr. Cook's title was that of a *clerk*, if any."

(6) "Now you will remember that Mr. Conrad of Republic testified at a deposition, which was read at the trial, that when he completed the qualifications inquiry form for the Civil Service, he may have pulled the clerk classification out of his head or he may have obtained it from some personnel card. And he stated that he didn't see any difference between a research analyst and a clerk. Yet, you heard Mr. Dolan testify that there was a lot of difference; that research analysts received salaries between $5,000 and $30,000 and clerks usually got from $40 to $75 a week in 1953 and 1954. It was also shown that research analysts require more education and experience."

(7) "You heard the testimony of Mr. Nelson, the personnel expert. He told how Republic was negligent in their personnel methods. He explained the termination form used by Remington Rand, where the final job title is put on the card, the employee has a chance to see it, and arbitrate if he is not satisfied with it. Then it was stated how the card is used in giving references. This insured the same reference coming from the same source at all times. On the other hand it was shown how Republic gave different references on Mr. Cook, some saying one thing, others saying another."

(8) "If you find that Republic made a negligent statement involving misrepresentation telling him that he was a research analyst but telling prospective employers that he was a clerk, and if you conclude that this misrepresentation defamed Mr. Cook by (1) making it appear that he falsified his application blanks and (2) underclassifying him, then you must find Republic liable for the damages previously explained. If you find that Mr. Conrad maliciously put down the clerk classification on the Civil Service form, knowing that it was not really his official title, then you may find

Republic liable for punitive damages as well. In finding malice you must conclude that the salary pay roll memorandum produced by Republic was not authentic but completed to conform with the Civil Service reference form."

g. How would the jury have decided if the instructions had looked like the above? It is safe to assume that it may have decided in favor of the plaintiff.

4. The Court of Appeals has Failed to Sustain a Common Law Theory of Negligence by Not Finding a Legal Duty and Defining the Standard of Conduct Required for the Protection of Others Against Unreasonable Risks.

a. Over the exceptions of counsel, the District Court ruled out all negligence in this case, no matter whether it was an independent theory of negligence or negligence as the equivalent of malice in a case of defamation.

b. Assuming that the plaintiff had not been told of his classification as a *research analyst*, would it have been just to have classified him as a *clerk* in a reference given to the Civil Service Commission, regardless?

c. In a case such as this, was there malice present? Could Conrad have just as well put down another title as was done on other references? Or was the official title in the records that of "clerk" and Republic just did not bother ever to tell the plaintiff that fact. If there were no malice present, was there negligence? By that is meant negligence in the legal sense.

d. The appellant argued in his brief that there was negligence, and that the appellate court should have decided as to the existence of a duty and as to the definition of a standard for the State of New York to conform with a decision of the Illinois Court of Appeals.

e. It has already been pointed out that New York recognizes a common law cause of action for negligent use of language. And a legal duty was determined in *Creitz v. Bennett*, 273 Illinois App. 88; namely, that an employer has the legal duty to classify an employee in a reference by using a job title which describes the work performed in the sense which persons (personnel officers in this case) of common and reasonable understanding would subscribe to that title in its ordinary and common acceptance. The duty always requires the same standard of conduct, that of a reasonable man under the same or similar circumstances. The standard is a legal rule given in the instruction to the jury. And if it can be reasonably shown that the failure of the employer to conform to this general standard of conduct has resulted in damages, the employer is liable. (If the negligence is used to replace malice in a case of defamation affecting employment, it is actionable without proof of damages.)

f. Because the plaintiff had been hired as a *market analyst* and because an expert witness testified that the plaintiff performed the work of a *market analyst*, there was a legal duty for Republic to so classify him as a *market analyst* and not as a *clerk* in sales promotion.

g. Whether this negligence is used to replace malice in a theory of defamation or whether it is treated as an independent theory of negligence is not too significant. The important point is that it should have been pointed out to the jury in the instructions.

h. And the District Court should not have ruled that if the job classification of *clerk* was in accordance with established procedure, it was all right even if it was not what the plaintiff assumed it to be. It was in *Marsh-Woods Products Co. v. Babcock & Wilcox Co.*, 1932, 207 Wis. 209,

240 N.W. 392 where it was ruled that some customs arise from the kind of inadvertance that is associated with negligence and that even an entire industry cannot be permitted to set its own uncontrolled standard.

5. The Court of Appeals, in Affirming the Judgment and Order of the District Court, has Indirectly Rendered Decisions in Conflict with the Decisions of other Courts of Appeals on the Same Matter.

a. In affirming the decision of the District Court it appears that the Court of Appeals is in agreement with the ruling on the law of the District Court both during the colloquy on instructions and in the actual charge of the court to the jury. This seems to indicate that the Court of Appeals has indirectly rendered decisions in conflict with other courts of appeals.

b. For instance, the District Court ruled that there must be malice to upset privilege in libel. Yet, in *De Ronde v. Gaytime Shops*, 239 F. 2d 735 the Second Circuit ruled that: "Under New York law, the 'malice' necessary to destroy qualified privilege does not mean alone personal ill will but may also mean such wanton reckless disregard of rights of another as is ill will's equivalent." The same ruling was held by the Second Circuit in *Stephens v. Columbia Pictures Corp.*, 240 F. 2d 764 (1957) cert. den. 353 U.S. 949 (1957).

c. The District Court ruled that negligence in no way could be argued. Yet, in *Gediman v. Anheuser Busch, Inc.*, 299 F. 2d 537 (1962) the Second Circuit ruled that New York State recognizes a common law cause of action for negligent use of language wherein an employer was held liable for negligently although in good faith, misinforming an employee as to the consequences of the election he had made upon retirement in the employer's

pension plan. In the same way, Republic as an employer, negligently and perhaps in good faith, misinformed Cook, an employee, that his official job title was *Commercial Research Analyst* when in reality it was *Clerk, Sales Promotion,* or so Republic claimed.

d. With regard to the District Court's denial of a motion for a new trial, other circuit courts have ruled differently. For instance, in *Ball v. Sears, Roebuck & Co.* (C.A. Ala.), 1955, 223 F. 2d 695 it was ruled "where plaintiff made out a case of negligence as a matter of law and thus became entitled to certain damages, but jury found for defendant, federal district court erred in not granting plaintiff's motion for a new trial."

e. In *Gordon v. U.S.* (C.A. Mich.), 1950, 178 F. 2d 896, cert. den. 70 S. Ct. 664, 339 U.S. 936, 94 L. Ed. 1354 the Circuit Court ruled: "A new trial should be granted where the court is reasonably well satisfied that the testimony given by a material witness is false, that, without it, the jury might have reached a different conclusion, that the party seeking the new trial was taken by surprise when the false testimony was given, and was unable to meet it or did not know of its falsity until after the trial." This citation fits this case exactly where Republic testified that everyone in the Export Department, other than the Export Manager and the Assistant Export Manager, were classified as clerks or equivalent. The plaintiff was not able to prove the falsity of this statement until after the trial and its falsity was proved during the hearing on the motion for a new trial and proved without any doubt whatsoever in the appellant's brief and appendix.

6. The Court of Appeals has so Far Departed from the Accepted and Usual Course of Judicial Proceedings by Sanctioning such a Departure by the District Court that there is Call for an Exercise of the Supreme Court's Power of Supervision.

a. It is felt that in the *Statement* and in the *Reasons for Granting the Writ* enough has been said with regard to the departure of the District Court during the judicial proceedings. The principal errors are enumerated below:

(1) Excluded relevant, competent and admissible evidence during the trial.

(2) During colloquy in chambers over the exceptions of counsel ruled out negligence as the equivalent of malice; ruled out mental anguish as a damage; and refused to comment on the tort involved when the defendant classified the plaintiff one way to his face and another way "behind his back."

(3) Denied the motion for a directed verdict.

(4) Made the following errors in the instructions:

a. Ruled improperly on the law with regard to defamation and negligence.

b. Misstated the facts in an argumentative and prejudicial manner, favoring the defendant.

c. Misstated the very claim of the plaintiff.

(5) Denied a motion for a new trial even when the plaintiff gave sufficient grounds:

a. Verdict was contrary to the law and the evidence.

b. There was exclusion of relevant and competent evidence.

c. Defendant offered false and misleading testimony.

d. Defendant was in contempt of court by refusing to obey two subpoenas.

e. Exhibits admitted in evidence were not shown to the jury.

f. The instructions were lengthy, repetitious, intricate, argumentative and confusing and the jury was not able to comprehend all the law and the facts.

7. The Courts of Law Historically have not Demonstrated either the Ability or the Desire to Protect Individuals in such Tort Actions Affecting Employment.

a. The plaintiff based his original complaint on actions discovered by investigative means. First, there was the Diggins Detective Agency report. Later, a member of the legal profession recommended an investigative agency in Washington. This was followed by the plaintiff forming a company solely for investigative purposes, the General Machinery Corporation. In spite of damaging statements made to these organizations, relief was not forthcoming. In *Sather v. National Dairy Products Corp.*, 233 N.Y.S. 2d 43 (1962) it was ruled: "An action for libel did not lie where statement alleged to be defamatory was made or published at procurement or inducement of one whose intent was to use the statement as a basis for commencing an action to recover for libel." Now your petitioner did not procure information for the purpose of commencing an action. He wished to find out possible reasons for his being rejected by over 100 companies after they had shown initial interest. When he learned what he did, then he commenced the action. Your petitioner learned that detective agencies work in cooperation with attorneys, but the courts in such decisions as the above have not cooperated with the agencies. Moreover, even after the damaging statements have been proven by investigative means, the courts have ruled that actual damages cannot be awarded in that the detective agencies

and other investigative means were "fictitious" bodies. The petitioner has not abandoned the evidence obtained in this manner. It shows intent and general course of action involving malice. However, he has had to rely on evidence obtained in the normal discovery proceedings after the original complaint was filed. When the new evidence was secured upon motion to produce, then an amended complaint was filed to include this new evidence. In other words, the defamation was a continuing process.

b. In an action of this sort, it has been found impossible to get admissions of damaging statements received by prospective employers.* The record shows that companies denied ever receiving references from Republic even when Republic produced letters which Republic claimed were mailed to them. That is why investigative means must be relied upon. And what company would ever state that they would have hired someone if they had not received such and such a reference from a previous employer?

c. Perhaps, historically, the Courts have considered plaintiffs of this sort as merely disgruntled employees. But in this case the record shows that the petitioner gave the government information in relation to anti-trust action. The petitioner believes protection should be forthcoming when the law and the evidence warrant it.

d. This case has been one "at law". No compensation as yet has been awarded, if it is at all possible to compensate one for ten years of almost total unemployment and eight years of litigation. It is understood by the petitioner that

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* At a hearing in 1960 the Court suggested a method of taking depositions upon written interrogatories upon prospective employers (Aplnt. 10a). Of the 49 deponents served 10 refused to answer in the way required; 9 refused to answer at all. The appellee quoted some answers in its brief. Plaintiff's counsel mentioned refusal of many deponents to answer (Aplee. 77-84).

it is necessary to have another case, one "in equity", to have an injunction imposed restraining the respondent from further libelous and slanderous actions.

e. Even if this action cannot prevent damaging phone calls and word-of-mouth references, it may have some effect on the whole process of personnel handling in relation to job evaluation and classification and the termination procedure including the handling of references. But even court action may not be the solution. To this day, if the petitioner should prepare another job resume and complete a company application form for employment, he is at a loss whether to state he was a *commercial research analyst* or a *clerk in sales promotion* with the respondent. And if his official status has been reduced to the latter by a negligent corporation, it is a pretty sad state of affairs.

CONCLUSION

For the reasons stated above, it is truly believed that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JERROLD K. COOK,
Petitioner.

April 1965.

APPENDIX A

JUDGMENT

(Filed and Entered on February 11, 1964)

In the District Court of the United States for the District of Maryland

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Jerrold K. Cook,

v.

Republic Steel Corporation.

Civil Action No. 10942

Trial by Jury, Judge Edward S. Northrop, Presiding
February 3, 4, 5, 10, 1964

Appearances:

For the Plaintiff: William Hoppen, Esq. and Johnson Bowie, Esq. (Resident Counsel).

For the Defendant: Joseph H. Young, Esq. and Spencer Everett, Esq.

JUDGMENT AND ORDER

It is ordered and adjudged that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff its costs of action.

EDWARD S. NORTHROP,
United States District Judge.

APPENDIX B

United States Court of Appeals
For The Fourth Circuit

No. 9615

Jerrold K. Cook, Appellant,

versus

Republic Steel Corporation, Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore,
EDWARD S. NORTHROP, District Judge.

(Argued January 7, 1965. Decided January 12, 1965)

Before HAYNSWORTH, Circuit Judge, and BOREMAN and J. SPENCER BELL, Circuit Judges.

Jerrold K. Cook, Appellant, Pro Se, and Mathias J. DeVito (Joseph H. Young and Piper & Marbury on brief) for Appellee.

PER CURIAM:

After careful consideration of the briefs and oral arguments we find no error affecting any substantial right of the plaintiff-appellant.

Affirmed

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1091

JERROLD K. COOK, *Petitioner*,

v.

REPUBLIC STEEL CORPORATION, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION

MATHIAS J. DEVITO,
JOSEPH H. YOUNG,
900 First National Bank Bldg.,
Baltimore, Maryland 21202,
Attorneys for Respondent.

The Daily Record Co., Baltimore, Md. 21203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1091

JERROLD K. COOK, *Petitioner*,

v.

REPUBLIC STEEL CORPORATION, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether both the District Court and the Circuit Court erred by failing to announce, for the first time, the existence of two new causes of action under New York law, in tort, permitting an employee to recover damages from an employer or former employer on account of the following activity on the part of the employer:

(a) failing to adopt a standardized job classification system which adequately describes every position in his organization;

(b) classifying an employee under an official job description which is different than that which is used to describe the position in letters of reference to prospective employers.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case is incomplete in some respects and in other respects it is wholly inaccurate. To make it even worse, it depends to a large extent upon material which is not a part of the Record below. Because of these serious shortcomings, Petitioner's Statement is not capable of giving this Court any accurate idea of what this litigation was really all about. Rather than spend its time in attempting to correct Petitioner's lopsided presentation, it would seem to be more sensible for Respondent to present here, instead, a complete and accurate Statement of the Case as it actually exists in the Record.

(A) *Petitioner's Background Prior to His Employment at Republic.*

Petitioner graduated from Harvard College in 1938 with a Bachelor of Science degree in Economics. Following graduation from college he worked for a year at the Calvert Street Bank in Baltimore City. In 1939, he left the bank and returned to Harvard where he secured 17 semester hour credits in Accounting Statistics at the Business College (App. 21, 54).* After a trip to Europe, he became employed at the State Street Trust Company in Boston as a messenger and check teller at a salary of $15.75 per week. He remained there for about 13 months and then joined the Fore River Shipyard of Bethlehem Steel in Quincy, Massachusetts, as a material requisition clerk at a salary of $26.00 per week (App. 54, 70). In 1941, he entered the Navy, and in 1946 he was discharged with the rank of Lieutenant Commander (App. 55).

In 1947, about a year after his discharge from the Navy, he secured a job as a management trainee, at a salary of

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* Figures in parentheses (App. . . .) are references to Appellee's Appendix below; (A. . . .) are to Appellant's Appendix below.

$55.00 per week, at the Container Corporation of America, which lasted for 3 months. At that time he became interested in the motion picture and television industry and started his own production company called the Douglas Jerrold Company. The business was not successful, and after a year Petitioner became employed with United States Steel in Pittsburgh, to work in cost accounting, at a salary of $270.00 per month (App. 57, 70). He stayed there a month and shortly thereafter, in 1948, he returned to Boston and worked in an insurance office at a salary of $55.00 a week. While there Petitioner became interested in foreign trade, enrolled in the Latin American Institute of New York, and started to write a book about the Marshall Plan (App. 57, 70). After two months at the insurance office, he went to Baltimore and joined the Cooper McDonald Company, "as sort as a partner", without salary, and within two or three months he left and started the Cook International Company, an export-import house in Baltimore (App. 59). He stayed in business for two years, and because he wasn't doing well, in 1951 he began to look for other employment (App. 59).

(B) *Petitioner's Employment at Republic*

Petitioner attempted to secure new employment by the means of a letter campaign. He sent out about 350 letters to presidents of major corporations in the United States, including one to Mr. Charles White, President of Republic (App. 21). Only Republic, through its Export Manager, David Bellamore, responded with a job offer (App. 21, 59, 132). Mr. Bellamore and Petitioner met in New York, and, after reviewing Petitioner's qualifications, Bellamore hired him to work in the exporting department. Specifically, his job was to take charge of the statistical work covering the

movement of Republic's export commodities, and to do market analyses to determine the possibilities for foreign markets for the sale of steel (App. 127, 132). Petitioner testified that Bellamore told him that he was to work as a "foreign market analyst" (A. 12), at a starting salary of $342.00 per month (App. 60). Republic had no established policy concerning job titles, but its records indicate that Petitioner was officially rated for its purposes as "Clerk — Sales Promotion" (A. 27, App. 116). The term "Clerk" was used at Republic as an all inclusive term to describe numerous categories of jobs in the sales department, including heads of departments, who were designated as "Chief Clerk" (App. 117-119, 121-122; A. 28).

Petitioner began to work at Republic on March 1, 1952, and remained there until December 9, 1953 (A. 12, App. 38). During the time that Petitioner was employed at Republic, he performed his work to the satisfaction of his superiors (App. 123, 128, 133). He worked directly under E. K. Clark, the Advertising Sales Promotion Manager of the Export Department (App. 22), and, in the course of his work, had occasion to prepare numerous reports, including comprehensive marketing surveys on Spain, Latin America, Mexico and Canada (A. 13, App. 23, 24), reports on competitors' foreign distribution centers, reports on the sales performance of other products abroad, as well as on some other miscellaneous subjects (App. 25-27, 28-31). He also prepared, on his own initiative, a report suggesting the establishment of a separate Market Research Division at Republic, to come directly under the Sales Manager rather than under the Advertising or Sales Promotion Manager. Petitioner anticipated that he would be the man to head up that new Department as Marketing Research Manager (App. 27-28, 61, 66-67). Most of the enumerated reports were complied solely by Petitioner, with

some help, however, from an assistant in the preparation of the charts and statistics (App. 27). Petitioner did 85% of his own typing while working at Republic (App. 66).

In November of 1953 Petitioner attended conferences at the American Iron and Steel Institute, as one of Republic's representatives, for the purpose of preparing a report for the President's Commission on Economic Policy. The report was to present a complete picture on the international trade situation in steel. Republic was to work on the portion relating to tariffs, and Petitioner was selected to do that job for Republic (App. 32-33). The report on tariffs which the Iron and Steel Institute proposed to submit disagreed with Petitioner's studies on the subject. Petitioner informed Mr. Bellamore of this fact, and prepared a report on the tariff situation in which he was critical of this country's policies with respect thereto. Mr. Bellamore ordered that his report not be made public (App. 34-37).

Two or three days after the foregoing conversations with Mr. Bellamore, on or about December 9, 1953, Petitioner met again with Mr. Bellamore, and this time tendered his resignation. Petitioner testified that his principal reason for resigning was his dissatisfaction with this country's price fixing policies in the export field (App. 37). However, in his discussion with Mr. Bellamore, he presented different grounds in support of his desire to leave Republic. He told Mr. Bellamore that he was fed up with making reports on subjects upon which other reports had already been made and he was tired of having his reports go unread. In addition, he stated that he desired to go into his own business (App. 37-38, 63, 133-134). Mr. Bellamore attempted to persuade Petitioner not to resign, but to no avail (App. 134). Petitioner's salary at the time he left Republic was $442.00 per month (App. 60).

Subsequent to leaving, Petitioner made some kind of a report or affidavit concerning Republic's, activities to the United States Department of Justice (App. 37). No one at Republic was ever told of this or ever learned of it until long after the institution of the present suit in 1957 (App. 67, 124, 129, 135). There is no evidence that this report or affidavit ever had any effect on Republic's classification or appraisal of Petitioner, or ever led to anything detrimental to Republic.

(C) *Petitioner's Activities and Efforts to Obtain Employment After Leaving Republic*

Following his resignation from Republic, Petitioner opened up a steel export commission house in New York called the Cook Steel Company, which, because of lack of success, was closed in October of 1954 (App. 38). Following this he began to look for employment, utilizing the same kind of "broadcast" letter campaign that he had employed prior to being hired at Republic. From 1954 to the time of trial he had employed 10 or 12 campaigns, sending out in all two or three thousand letters. He also advertised in the newspapers (App. 39-40). He sought employment first in the export field, but because the field was so small, he later broadened his efforts to secure work in the accounting profession. About 95% of his efforts were to secure a job as an Export Sales Manager or Assistant Export Sales Manager for a company in the export field (App. 40-41, 67-69). He always gave Republic as a reference because it had been his primary past employment (App. 40).

During the period while he was actively looking for work, he opened a small company called Marketing Services, a management consulting firm, and after it failed, he worked a short time for Fabricated Steel in Maryland as a

salesman. He left the latter firm because he did not approve of certain of their policies and because they did not consider him to be a good sales closer (App. 41-42). Besides these jobs, and a renewed effort to get into the motion picture business, Petitioner secured no other work after leaving Republic (App. 64).

(D) *Republic's References*

Republic has no centralized or coordinated personnel department, each department in the company having charge of its own personnel (App. 113). Any letters for recommendations are handled by the particular office in which the employee worked (App. 114). The staff of the Export Department, the department in which Petitioner worked, was never given any instructions concerning the manner in which Petitioner's references were to be handled, the employees in that department being left to use their own judgment (App. 124-125, 131, 135). The following are the references which were given by members of the Export Department concerning Petitioner:

(1) *New York State Department of Labor, Division of Placement and Unemployment Insurance — 1953*

Upon Petitioner's termination at Republic he was given a record of employment by the office manager, Mr. Kipp, for use at the New York State Department of Labor. It listed his occupation as a "commercial research analyst" (A. 20a, App. 38-39).

(2) *Argus Cameras, Inc. — 1955*

This reference, prepared by Mr. Clark, Petitioner's immediate supervisor, was in response to a written inquiry from Argus (App. 152). The reference reads in part as follows (App. 153):

"Mr. Cook's duties were concerned primarily with sales research covering the sale and potentials on steel and steel products manufactured by Republic and its various divisions. All of this work related to the overseas operation of the corporation under the general management of the Export Department.

"During his employment, Mr. Cook showed definite capabilities with respect to sales research, and turned in many assignments of marked merit. We feel that Mr. Cook has, as we mentioned above, real ability in this field, and should be able to turn in work of high caliber."

(3) *Diggins Detective Agency — 1956*

This inquiry was directed to Republic by Petitioner himself, through the Diggins Detective Agency (App. 43). The letter from Diggins to Republic states that Petitioner had listed Republic as a former employer, that he had listed as his occupation "market research analyst", and it asked a number of questions. The pertinent questions, and the answers thereto given by Mr. Clark, are as follows (A. 32):

"3. *Reason for Leaving:* Resigned, feeling scope of research not broad enough.

4. *What position held:* As above.

5. *Any criticism of the subject, in any respect:* He desired to build up too large a department than justified.

6. *Would you rehire:* No."

(4) *General Machinery Company — 1956*

The General Machinery Company was a psuedo company employed by Petitioner for the purpose of securing a reference on himself from Republic. He engaged a mail and telephone answering service run by one Thomas L. Smith in Washington, D. C. to assist him. Petitioner claims that he personally mailed a letter to Republic, signed by himself under the name of Ralph Scott, Personnel Officer

of General Machinery, in which he requested an employment reference on himself (App. 44-48). Republic denied ever having received the letter (App. 46-47, 48), but, over Republic's objection, the Court admitted what purported to be a carbon copy of that letter into evidence (A. 30, App. 48). Petitioner introduced into evidence, over Republic's continuing objections (App. 71-75), Smith's deposition, in which he testified as follows: In the spring of 1956 Petitioner called him and asked him to take a long distance call which was about to come in from a man whose name Smith could not recall. The man subsequently telephoned, stating that he was from Republic Steel and was replying to the letter of General Machinery for a recommendation on Petitioner (App. 138). Smith did not recognize the voice at the other end and did not remember the city from which the call was placed (App. 144). The man told Smith that Petitioner had been released or discharged from Republic because he had wanted to make a big department out of a little one and had "ideas of grandeur, or words to that effect" (App. 139, 144).

(5) *Charles P. Raymond Service, Inc. — 1957*

The Charles P. Raymond Service, Inc., a confidential employment service for textile, pulp and paper mills, wrote to Republic and informed them that Petitioner was seeking work with them in "Export sales, Prod. Assist. Dom. Sales Accounting" and asked for a report. Mr. Kipp, the office manager, replied for Mr. Clark, who was on vacation, and filled out the form as follows (App. 149-150):

> "*When and how long was he in your employ?* 3-1-52 through Dec. 54.
>
> "*As what?* Research.
>
> "*Was his work satisfactory?* Excellent.

* * * * * *

"Why did he leave? Research work completed.

"Would you re-employ him? No further need for research work.

"Did you find him honest? Yes. *Industrious?* Very.

* * * * * *

"Can you recommend him for position he is seeking? Should be good type work involved."

(6) *United States Civil Service Commission — 1957*

In 1957 Petitioner applied to the United States Civil Service Commission for a rating as an economist (GS11), stating in his application that he would accept no less than $6,390 per year in salary (A. 21). In his application he described his position with Republic as a "foreign marketing analyst" and described his work as "conducting market studies on many areas throughout the world" (A. 22). Republic's answer to the government's questionnaire was filled out by Mr. Conrad, Assistant Export Manager, and in response to a question seeking Petitioner's "official title or organizational position", his position was listed as "Clerk — Sales Promotion & Research". In response to other questions, Mr. Conrad stated that Petitioner had done economic research (market research) in overseas steel sales; that his work was done under general supervision, but that he was responsible for planning some portions; that he wrote the final reports, which were rarely revised; that his conclusions were generally sound and accurate; that his economic data had been secured from primary sources as well as trade journals and publications (A. 24).

With respect to Petitioner's knowledge, abilities and skills in economics, Mr. Conrad rated him as "very good" in every category, except in his ability to cooperate with co-workers and his ability to supervise and direct others, which was listed as "fair" (App. 146).

As a result of this application, Petitioner received a rating as an economist from the Civil Service Commission in the category of GS9 (App. 69).

(7) *William V. Rauscher Associates — 1958*

Mr. Rauscher, a friend of Petitioner's, wrote a letter to Republic inquiring as to Petitioner's employment at Republic, not for the purposes of employing him, but again to check on Republic's references. Mr. Kipp wrote back as follows (App. 151):

> "A review of our employment records indicates that Mr. Cook was employed by Republic Steel Corporation on March 1, 1952 as a statistician. His duties included the preparation of statistics concerning foreign markets in the steel industry. His reports on this subject were of excellent quality and he was considered to be an honest and industrious employee. Mr. Cook resigned from employment with Republic Steel Corporation on December 9, 1953."

(E) *The Evidence Concerning the Effect of Republic's References Upon Petitioner's Efforts to Secure Employment*

There is no evidence in the Record to the effect that any of Republic's references interfered with Petitioner's efforts to secure employment. Petitioner himself testified that no prospective employer ever told him that they had failed to hire him because of Republic's references (App. 69).

(F) *The Proceedings Below*

Petitioner filed suit in the United States District Court for the District of Maryland on September 24, 1957, his final amended complaint alleging in substance that, through the dissemination of false, incon-

sistant and damaging references, Republic had wrongfully interfered with his right to seek honest employment. After numerous changes of counsel by Petitioner, and at the end of a lengthy period of pretrial activity, the case came to trial on February 3, 1964. The trial lasted four days. All of the testimony outlined above was put into evidence as part of the Petitioner's case. In addition, Petitioner introduced the expert testimony of a market analyst, Philip Dolan, to the effect that the reports submitted by Petitioner during his employment were those of a "market analyst or a sales analyst, economic analysis, foreign economic research" (App. 102). Dolan admitted on cross-examination, however, that the work also fit under the description of a "statistical clerk" as given in the "Dictionary of Occupational Titles", and that Petitioner's work was basically in sales promotion (App. 105-106). The Court refused to permit a neighbor of Petitioner's, George M. C. Nelson, to testify as an expert concerning standard reference and termination procedures in large corporations of which he was acquainted (App. 106, et seq.).

At the end of Petitioner's case, Republic made a motion for a directed verdict (App. 17), which the District Court denied, stating "I will say this, it is on the thinnest grounds I deny it, I must say" (App. 76). At the conclusion of Republic's short case, the motion was renewed and again denied by the Court (App. 85). The jury returned a general verdict in favor of Republic (App. 100).

On appeal to Fourth Circuit, the judgment was affirmed in a per curiam opinion.

ARGUMENT

Although Petitioner alludes throughout his Brief to numerous alleged errors in the proceedings below, the real complaint that he brings to this Court relates to the District Court's charge to the jury.* His argument is difficult to follow, but he seems to claim that the charge was erroneous primarily because the District Court did not incorporate therein an instruction which would recognize, for the first time, two new causes of action under New York law. These new causes of action, said to be predicated on a theory of negligence, are for the following alleged wrongs: (a) an employer's failure to adopt a standardized job classification system which adequately describes every position in his organization and (b) an employer classifying an employee under an official job description which is different than that which is used to describe his position in letters of reference to prospective employers.

It seems evident from the nature of the question involved that this case is not the kind of case that this Court should review on certiorari. It fails to meet any of the criteria established by this Court for the review of lower federal court decisions, and, in addition, involves a cause which is patently not meritorious.

1. None of the Traditional Grounds for Granting the Writ are Present Here.

It was agreed between the parties hereto, both in the District Court and in the Circuit Court, that New York

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* In addition to his allegations concerning the District Court's charge, Petitioner makes various vague, generalized complaints about its rulings on the evidence and its failure to grant him a new trial. Because Petitioner himself, lays no great emphasis on these matters, and because it is so clear on its face that they could not be a basis for the granting of the writ, they will not be further referred to in this Brief.

law governed this litigation. Consequently, the District Court's instructions were based on the New York law that it found to be applicable to the case under the pleadings and the evidence. The pleadings indicated that two general theories of recovery were involved: (1) libel and (2) *prima facie* tort for wrongful interference with the right to secure employment. The New York law is quite clear on these subjects and, as can be seen from the charge itself, it was adequately presented to the jury in the District Court's instructions.

It was in the Circuit Court that the Petitioner claimed for the first time that the District Court had failed to recognize his two new theories of recovery. Even if it be assumed that he could have raised this question for the first time in the Circuit Court, and even assuming as fairly disputable his contention that justice required that his new torts be recognized, he has presented in his Petition no ground sufficient for this Court's intervention. Patently, the matter involves no question of federal law, important or unimportant. Moreover, there is involved no conflict between the lower court's action (or inaction) and the established New York law. To the contrary, it is the absence of any established favorable New York law that Petitioner would have liked to have had the lower courts change by the creation of two new causes of action. No conflict in the opinions of any of the Circuits has been shown, and certainly no departure by the lower courts here from the accepted and usual course of judicial proceedings has been established.

In short, no traditional ground for the granting of certiorari exists in this case, and, for that reason, it is submitted that the writ should not issue.

2. The Petitioner's Claim is Not Meritorious

An additional ground for refusing to grant the writ is the clear lack of merit in any of the Petitioner's claims.

As has been noted above, the heart of Petitioner's contention here appears to be the failure of the lower court to have included in its charge any instructions setting forth his two new theories of negligence. Assuming that the Maryland District Court would have had the right to add two brand new causes of action to the New York law, those suggested by Petitioner could not be the ones.

With respect to the first so-called tort (the failure to establish a standard job classification system) there has been suggested no logical basis upon which such a right of action could have been predicated. No duty exists on the part of any employer toward an employee to give him a uniformly recognized job classification, and we cannot conceive that any court would hold to the contrary. To establish such a duty would be to place a burden upon industry and commerce that would be extremely difficult to meet, and for very little good reason. There is no need for this kind of an obligation, and no fairness in the establishment of a wholly new cause of action based upon a breach of it.

There is also little need under the law for the second suggested new tort (the classification of an employee under an official job description different than that which is used in letters of reference). If the employer makes a material misstatement of facts concerning an employee in an employment reference, maliciously or as a result of gross or wanton negligence, the New York law provides a clear remedy in an action for libel or slander. See *Nichols v. Item Publishers, N.Y.*, 132 N.E. 2d 860 (1956). If the employer makes even a true statement concerning an employee in an effort to interfere with his securing employment, and does so

maliciously, a remedy exists in *prima facie* tort. *Al Raschid v. News Syndicate Co.*, N.Y., 191 N.E. 713 (1934); *Gersh v. Kaspar & Esh, Inc.*, 206 N.Y.S. 2d 510 (1960). Any improper activity on the part of an employer in connection with the giving of references for a former employee is thus already covered by the tort law of New York. The new separate causes suggested by Petitioner are obviously unnecessary, except, perhaps, to provide him with some ground for recovery now that all others available under the law of New York have failed him.

CONCLUSION

A glance at the outline of facts presented in this Brief's Statement of the Case will reveal that Republic has committed no wrong against Petitioner. Petitioner has had a full and fair trial before a jury in the District Court, and was accorded a fair hearing on appeal. Because he was without counsel in various stages of the proceedings below, he was given extraordinary consideration by both of the lower courts. He obviously has devoted a considerable amount of personal time already in pursuing what certainly must amount to a hopeless cause. It would be most unfair to him, let alone Republic, to allow this case to go any further.

For the foregoing reasons, it is submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

MATHIAS J. DEVITO,

JOSEPH H. YOUNG,

Attorneys for Respondent.